IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

▯ ▯ ▯

RICHARD S. SIMPSON, Appellant,	]	
vs.	]	No. 22148
UNION OIL COMPANY OF CALIFORNIA, Appellee,	]	

APPELLANT'S OPENING BRIEF

MAXWELL KEITH
R. CORBIN HOUCHINS
111 Pine Street
San Francisco, California
Telephone: 981-1361

JAMES J. DURYEA
Mills Tower Building
San Francisco, California
Telephone: 362-7422

Attorneys for Appellant

Table of Authorities..... iii

Statement of Jurisdiction..... 1

Statement of the Case..... 2

Questions Presented..... 10

Specification of Errors..... 12

Summary of Argument..... 14

Argument..... 23

I. THE MANDATE OF THE UNITED STATES SUPREME COURT IN SIMPSON v. UNION OIL COMPANY OF CALIFORNIA DID NOT ALLOW THE DISMISSAL OF APPELLANT SIMPSON'S COMPLAINT WITH PREJUDICE..... 23

A. The Last Sentence in the Simpson Opinion Did Not Apply to the Success of Appellant, Simpson..... 23

1. The courts are prohibited by the Constitution to refuse to enforce a cause of action created by Congress..... 23

a. Under the doctrine of separation of powers, the trial court could not determine whether the Sherman Act, as interpreted by the Supreme Court, should apply to Union Oil Company of California..... 23

b. Simpson's right to relief has been denied him despite a proven wrong and damages suffered. Such denial deprives Simpson of due process of law under the United States Constitution, Fifth Amendment.... 27

c. A jury trial must be granted on all facts affecting Simpson's right to relief... 28

d. The Supreme Court cannot be presumed to allow equities to a coercive scheme carried out by appellee..... 30

States Supreme Court in Simpson v. Union Oil Company reserving prospectivity did not apply to simpson as a matter of reasonable interpretation..... 32

B. Even Assuming the Language of The Supreme Court as to Prospectivity was Applicable to Mr. Simpson, the Trial Court Had No Jurisdiction Under That Mandate to Dismiss Plaintiff's Complaint, Since the Matter was Reserved to the Supreme Court of the United States..... 37

II. FINDINGS OF FACT BELOW UPON WHICH THE JUDGMENT DISMISSING SIMPSON'S COMPLAINT WERE BASED ARE IMMATERIAL OR ERRONEOUS. THERE ARE NO EQUITIES IN THIS RECORD IN FAVOR OF DEFENDANT UNION OIL COMPANY..... 38

III. A VERDICT WITHIN THE RANGE OF ARGUMENT PERMITTED BY THE COURT AND SUPPORTED BY EVIDENCE PROPERLY ADMITTED IS A PROPER BASIS FOR JUDGMENT..... 58

A. The Court Should Have Struck the Statements of Jurors Grigon, Smith and Price Impeaching the Verdict Before It Considered Defendant's Motion for a New Trial..... 58

B. The Trial Court Erred in Granting Defendant's Motion to Set Aside the Verdict and Granting a New Trial..... 60

Conclusion..... 63

Table of Exhibits (Appendix)..... i

TABLE OF AUTHORITIES

Cases Cited:	Page
Atlantic Ref. Co. v. Federal Trade Comm'n, 381 U.S. 357 (1965)	19, 31
Baltimore & Car. Line v. Redman, 295 U.S. 654 (1935)	29
Beacon Theatres, Inc. v. Westover, 395 U.S. 500 (1959)	29
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1929)	28
Bruce's Juices v. American Can Co. 330 U.S. 743 (1947)	27, 28
City of Atlanta v. Chattanooga Pipe & Foundry Co., 127 Fed. 23 (6th Cir. 1903)	25
Dooling v. Overholser, 243 F.2d 825 (D.C. Cir. 1957)	35
E. L. Farmer & Co. v. Hooks, 239 F.2d 547 (10th Cir. 1956)	59
England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)	34
Dimick v. Schiedt, 293 U.S. 474 (1935)	29
Federal Trade Comm'n v. Sun Oil Co., 350 F.2d 624	22
Federal Trade Comm'n v. Texaco, Inc., 381 U.S. 739 (1965)	19, 31
Federal Trade Comm'n v. Sun Oil Co., 3 Trade Reg. Rep. 24,542 (FTC 1963)	21
Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963)	29
Forth Worth & Denver Ry. Co. v. Thompson, 216 F.2d 790 (5th Circ. 1954)	59
Galloway v. United States, 319 U.S. 372 (1943)	29
Galarza v. Union Bus Lines, Inc., 38 F.R.D. 401 (S.D. Tex 1965)	59
Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932)	34

Hodges v. Easton, 106 U.S. 408 (1882) 29

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 27

Liquid Veneer Corp. v. Smucker, 90 F.2d 196 (9th Cir. 1937) 62

Mainelli v. Haberstroh, 237 F.Supp. 190 (M.D. Pa. 1964) 62

Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948) 27

McDonald v. Pless, 238 U.S. 264 (1915) 59

Molitor v. Koveland Community Unit Dist., 18 Ill. 2d, 163 N.E. 2d 89 (1959) 35

Linkletter v. Walker, 381 U.S. 618 (1965) 18, 20,34 35, 36

Montgomery Ward Co. v. Duncan, 311 U.S. 243 (1940) 29

Northern Pac. Ry. Co. v. Mely, 219 F.2d 199 58

Northern Pac. Ry. Co. v. U.S., 356 U.S. 1 ..... 47, 50

Northern Sec. Co. v. United States, 198 U.S. 197 (1904) 17, 23,25

Nye v. United States, 313 U.S. 33 (1941) 35

Federal Trade Comm'n v. Beech-Nut Packing Co. 257 U.S. 441 (1922) 14, 18,33 42

Peterman v. Indian Motorcycle Co., 216 F.2d 289 (1st Cir. 1954) 62

Radovich v. National Football League, 352 U.S. 445 (1957) 27

Silver v. N.Y. Stock Exchange, 373 U.S. 341 (1963) 27

Simpson v. Union Oil Co., 377 U.S. 13 (1964) 5, 6,8,14 15,19,20 31,32,35 36,37,38 39,43,44 45,46,48 50,55,56

Simpson v. Union Oil Co., 311 F.2d 764 (9th Cir. 1963) 2,15,19 20,42,45 51,55

Simpson v. United States District Court, 385 U.S. 806 (1966) 9

Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913) 29

Smith-Blair, Inc. v. R.H. Baker & Co., 232 F.Supp. 484 (S.D. Cal. 1962) 59

Southern Pac. Ry. Co. v. Mely, 219 F.2d 199 (9th Cir. 1954) 22

Standard Oil Co. of California v. United States, 337 U.S. 293 (1949) 14,19, 45

Stein v. New York, 346 U.S. 156 (1953) 59

Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) 47

United States v. Gen. Elec. Co., 212 U.S. 476 .....1, 19, 39 43,44, 50 51

United States v. Masonite Corp., 316 U.S. 265 .....14,18, 20 42,43, 50

United States v. Parke-Davis & Co., 362 U.S. 29 (1960) 18, 45

United States v. Richfield Oil Co., 343 U.S. 922 (1952) 1, 20, 47 50, 51

United States v. Richfield Oil Co., 99 F.Supp. 280 (C.D. Cal. 1951) 18,19, 31 47

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 18, 50

Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) 27

Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941)..... 35

Constitutions Cited:

U.S. Const., art. I, Section 1 32

U.S. Const., art III, Sections 1 & 2 32

U.S. Const., art VII 18

U.S. Const., amend. VI 29

Statutes Cited:

15 U.S.C. Section 1 (1964) 3

15 U.S.C. Section 2 (1964) 3

15 U.S.C. Section 15 (1964) 1, 3

15 U.S.C. Section 26 (1964) 1

28 U.S.C. Section 2072 (1964) 29

Federal Rules Cited:

Fed. R. Civ. P. 38(a) 29

Fed. R. Civ. P. 50(b) 2, 29

Texts Cited:

71 Yale L.J. 907 (1962) 27

Cong. Rec. 2,456 (1890) 25

H. R. Rep. No. 1,157 (1957) 52,53,54

35 C.J.S. Factors 1 (1960, Supp. 1967) 49

21 C.J.S. Courts Section 194 (1940, Supp. 1967) 37

20 Am. Jur. 2d Courts Section 233, at 562 (1965 Supp. 1967) 37

Annot., 14 L. Ed 2d 993 (1966) 35

R. CORBIN HOUCHINS
111 Pine Street
San Francisco, California
Telephone: 981-1361

JAMES J. DURYEA
Mills Tower Building
San Francisco, California
Telephone: 362-7422

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

▯ ▯ ▯

RICHARD S. SIMPSON, Appellant, vs. UNION OIL COMPANY OF CALIFORNIA, Appellee.	No. 22148 APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

Appellant, Richard S. Simpson, filed a complaint against the Union Oil Company of California under the federal anti-trust laws, specifically Title 15, U.S.C.A., Sections 15 and 26, being part of an act of the federal Congress, commonly known as the Sherman and Clayton Acts, which vest in the District Court jurisdiction of suits by any person injured in his business or property by reason of anything forbidden in the antitrust laws. The plaintiff-appellant appeals from a judgment for the defendant dismissing plaintiff's complaint with prejudice, notwithstanding a jury verdict that appellant was damaged in the sum of $160,000.00 by appellee. (Cr. 548-550, 297)

The court in the same order denied appellee's motion under F.R.C.P. Rule 50(b) for judgment notwithstanding verdict, but granted the appellee a new trial. (Cr. 550) Appellant here seeks review of the court's order granting a new trial.

This is the second appeal between the parties. The District Court below gave judgment for defendant on January 6, 1961. (R. 360-361) Appeal was taken and this court affirmed the judgment under Docket Number 17308 on January 2, 1963. Simpson v. Union Oil Company of California, 311 F.2d 764 9th Cir., cert. granted, 373 U.S. 901 (1963), rev'd, 377 U.S. 13 (1964).

Accordingly, this brief will refer to the record in Appeal Number 17308 in the United States Court of Appeals for the Ninth Circuit as "R.", to the clerk's record in the above numbered appeal No. 22148 as "Cr." and to the reporter's transcript of the trial as "Tr."

STATEMENT OF THE CASE

a. Basis of Suit:

Appellee refused to renew appellant's one year lease to a Union Oil service station at 4010 East Ventura Avenue, Fresno, California, pursuant to an unlawful plan to control otherwise independent judgments as to retail prices by the service station dealers. The program of Union Oil Company to so control resale prices was called the Retail Dealer Consignment Agreement Program. Appellee's refusal to allow a renewal of the lease arose out of appellant's refusal to abide by the retail price fixing directions of the

Section 4 of the Clayton Act, October 14, 1914, Chap. 323, Sec. 4, 38 Stat. 781, U.S.C., Sec. 15, states:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

Sections 1 and 2 of the Sherman Act provide in part:

> "Section 1: Every contract, combination in a form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." 15 U.S.C. Sec. 1 (1964).

> "Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . . " Id. Sec. 2

Union Oil Company of California embarked on a

13, 3, 4, 7, 8) At all times herein, Union Oil Company issued only one year leases. Under the Retail Dealer Consignment Agreement Program the dealer was required to sign a consignment agreement allowing control of his gasoline prices as a condition to lease occupancy. (Tr. 391, 393-395) The dealer's prices were policed. (Pl. Ex. No. 15) The dealers had no opportunity to change the agreement, as they could not obtain a lease renewal unless they agreed to remain on consignment. (P. Ex. Nos. 7, 8; Tr. 395) The dealers were threatened by Union Oil Company representatives that they had better raise(or lower)the retail price. (Tr. 605-607) In order to prevent a court test, Mr. Simpson was warned it was foolish of him to try to sue Union Oil Company. (Tr. 622-623)

b. Proceedings below:

The appellant originally filed a compaint for an injunction on May 21, 1958. Plaintiff had originally sought to maintain possession of the service station site as to which he was a lessee under a one year lease commencing May 23, 1956. (R. 89) Plaintiff had signed another lease dated May 23, 1957, and this lease was not renewed as of May 23, 1958. (R. 28-36, 93) The United States District Court below, The Honorable George B. Harris, Judge, denied plaintiff's application for a preliminary injunction and issued a Memorandum Opinion and Order (R. 42-44), stating, in part, as follows:

"If plaintiff has a cause of action for

defendants' alleged breach of a contractual relationship, he is not without remedy, which is adequate to compensate him. (Cappeta vs. Atlantic Refining Co., 74 F.2d 53." (R. 44)

Thereafter, plaintiff filed an amended complaint. (R. 46-59) Defendant then moved for a summary judgment on the amended complaint on July 18, 1958 (R. 59-61), which was denied. (R. 87-88)

Pretail conferences were held on April 30, 1959 (R. 368-392), May 21, 1959 (R. 392-406), February 11, 1960 (. 407.435), and September 16, 1960 (R. 436-452). Pursuant to these pretrial conferences, motions for summary disposition were argued, the defendant moving for a summary judgment and the plaintiff for a partial summary judgment on the issue of violation of the antitrust laws. (R. 298, 337-338) The District Court below entered its Memorandum and Order denying plaintiff's motion for partial summary judgment and granting defendant's motion for summary judgment. (R. 347-360) This order was the subject of appeal number 17308, supra, and of the decision of the Supreme Court in this case, 377 U.S. 13.

In Simpson v. Union Oil Company of California, 377 U.S. 13 (1964), the Supreme Court held that Union Oil Company's Retail Dealer Consignment Agreement program violated the Sherman Act. Its opinion concluded as follows:

"Hence on the issue of resale price maintenance under the Sherman Act there is nothing left to try, for there was an agreement for resale

price maintenance, coercively employed.

"The case must be remanded for a hearing on all the other issues in the case, including those raised under the McGuire Act, 66 Stat. 631, 15 U.S.C. Sec. 45 and the damages, if any suffered. We intimate no views on any other issue; we hold only that resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws, and that petitioner suffered actionable wrong or damage. We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announced today." 377 U.S. at 24-25.

At trial appellee withdrew the McGuire Act defense upon appellant's rebuttal offer to prove price conversations between Union Oil's manager and those of its competitor Sunland Oil Company pertaining to the area where Mr. Simpson's station was located. The proffered testimony appears in the deposition of Mr. Fred Perry Olson. (Tr.1491-1501; [illegible] No. 89 for Ident., see R. 494-525).

Upon the remand further pretrial conferences were held on August 26, 1965, December 6, 1965, May 17, 1966, and June 20, 1966. (Tr. 2-136) The plaintiff having filed his pretrial statement on August 24, 1965 (Cr. 5), the defendant urged at the first pretrial conference that there should be a

ruling as to whether or not the mandate of the Supreme Court allowed the defendant to show equities allowing only a purely prospective application of the Supreme Court decision, which would prevent the recovery of damages by appellant. By the second conference, Union Oil Company had filed its pretrial papers. (Cr. 26-36)

Argument was held with respect to the scope of the Supreme Court remand and the matter was briefed by the parties. A subsequent pretrial hearing was held on May 17, 1966, at which time the District Court held that the mandate of the Supreme Court allowed defendant Union Oil Company of California to present evidence in support of its theory that the equities would preclude application of the Supreme Court's decision to Simpson himself. (Tr. 98-99)

Thereafter, appellant filed "Plaintiff's Amendment To Its Pretrial Statement Following The Pretrial Conference of May 17, 1966" (Cr. 103-108), and "Plaintiff's Motion For Further Specification of the Pretrial Order and For the Production of Documents." (Cr. 109-112) Plaintiff's motion was heard on June 20, 1966.

At that time the defendant filed opposition papers and a proposed pretrial order. The District Court denied the plaintiff's motions and entered its pretrial order without allowing plaintiff to file his proposed order and with only cursory discussion. (Tr. 128-135) The Pretrial Order stated with respect to the "equity" issue:

"Included in the issues to be tried is the issue whether the equities warrant only prospective

application of the rule announced by the Supreme Court in this case governing price fixing by the consignment device; specifically, in this case, where the facts occurred before the Supreme Court announced its rule, whether the equities preclude application of that rule. In that connection, upon the trial of the case, defendant shall be afforded an opportunity to present to the Court and to the jury evidence supportive of its claim that the equities do not warrant application in this case of the rule respecting consignment agreements announced by the Supreme Court." (Cr. 124)

The Court also foreclosed the issues of whether defendant had "attempted to monopolize" the wholesaling and retailing of gasoline in violation of Section 2 of the Sherman Act, and whether the defendant had unlawfully tied the sale of petroleum products to its leases in violation of Section 1 of the Sherman Act or entered into exclusive dealing contracts with its dealers. (Cr. 124-125)

Following the Pretrial Order of June 20, 1966, appellant filed in the United States Supreme Court his "Motion For Leave to File Petition and Petition for Writ of Prohibition of Mandamus or Both In The Alternative" seeking a writ prohibiting enforcement of the pretrial order, a writ compelling respondent Court to preclude defendant from asserting any "equities" which would warrant prospective application of the Simpson decision, 377 U.S. 13, supra, in any other court than

the District Court to allow trial of the aforesaid excluded issues. The writs were denied. Simpson v. United States District Court, 385 U.S. 806 (1966).

On January 23 and 24, 1967, the trial court and counsel held final pretrial conferences. (Tr. 137-206) Jurors were impaneled on January 26, 1967 (Cr. 572-573), and trial commenced January 30, 1967, before the Honorable Albert C. Wollenberg and a jury. Prior to the instructions to the jury, the Court allowed the defendant to present testimony in support of its defense on the "equities" in the presence of the jury, but at the close of the plaintiff's case in rebuttal, the Court withdrew the issue of a defense based on the equities from the jury's consideration and for the first time declared it exclusively for the trial court's determination. (Tr. 1631-1632)

On February 17, 1967, the jury returned a verdit for the appellant in the sum of $160,000.00. (Cr. 297) The court refused to enter a judgment on the jury verdict and scheduled hearings on the issue of prospectivity under the so-called "equity" defense. (Tr. 1670)

More than 10 days after the verdict, defendant on March 10, 1967, filed its "Notice of Motions for Judgment Notwithstanding the Verdict and for a New Trial." (Cr. 301-303, 345, 348) The Motions were supported by affidavits of two jurors and the declaration of juror Elaine Grigon. The declarations were obtained by counsel for the defendant, who had solicited the jurors. (Tr. 1784-1786) Following the filing

for Entry of Judgment, Determination of Reasonable Attorney Fees, Striking the Affidavits and Declaration of Jurors Marjorie Smith, William Price and Elaine Grigon." (Cr. 361-365) The Court on April 28, 1967, denied plaintiff's motion to strike the juror affidavits and declaration, to enter judgment on the verdict, and to enter reasonable attorney fees. (Cr. 575)

The same day the Court announced its decions that it would enter judgment for the defendant based on the equities. (Tr. 1803) The trial court denied defendant's motion for a judgment notwithstanding the verdict but ordered a new trial on the grounds that the verdict was against the weight of the evidence, shocked its conscience, was grossly and monstrously excessive, resulted from either passion or prejudice or from consideration by the jury of factors irrelevant to the litigation, was speculative and conjectural, and constituted a miscarriage of justice. (Cr. 550)

QUESTIONS PRESENTED

1. Did the statement of the Supreme Court, "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' devices which we announce today" authorize the District Court to allow appellee a hearing on the equities in Simpson's action against it?

2. Does the United States Constituion allow a federal district court general power to refuse to enforce a

jury verdict which has found that a party has been damaged under an act of Congress?

3. Are the Sherman Act and the private right of action based on the Sherman Act, 15 U.S.C.A. Sec. 15, subject to nonstatutory defenses in favor of those at whom the Sherman Act was aimed?

4. Even assuming that the Supreme Court's mandate allowed a determination of the equities so that the District Court could review whether or not its decision would be prospective, are there any equities in favor of a party who has pursued price control in the face of investigations of the Department of Justice and Congress and whose General Counsel has admitted that the coercive features of the price control program were left to marketing?

5. Did the Court err in not entering a judgment for the plaintiff on the jury's verdict?

6. May a trial court which has permitted a plaintiff to introduce evidence and make arguments to the jury on damages in a certain range of figures grant a new trial on the ground of excessive or monstrous damages, where the verdict is within that range?

7. Did the trial court err in not striking juror affidavits based on attorney interviews?

8. Did the pretrial order of June 20, 1966, conflict with the mandate of the Supreme Court allowing the plaintiff a trial determination of all remaining issues, by deleting the issue of appellee's violation of Sections 1 and 2 of the Sherman Act by entering into unlawful tie-ins and exclusive

attempting to monopolize the wholesaling and retailing of petroleum products?

SPECIFICATION OF ERRORS

I. The Trial Court erred in refusing to enter judgment on the jury verdict for plaintiff.

II. The Trial Court erred in dismissing defendant's complaint with costs, based on so-called "equities" favorable to Union Oil Company.

III. The Findings of Fact by the Trial Court do not support its judgment.

IV. Findings of Fact Nos. 1 through 15, are erroneous:

A. Findings of Fact Nos. 1, 3, 7, 8, 9, 10, 11, and 13 are erroneous because they are in conflict with the opinion of the Supreme Court in this action.

B. Finding of Fact No. 2 is erroneous in that the record shows that General Counsel of Union Oil Company failed to study the antitrust laws applicable to its retail price control program as carried out.

C. Finding of Fact No. 4 is erroneous because the record affirmatively shows that General Counsel testified that the implementation of the Retail Dealer Consignment Agreement program was left to appellee's marketing personnel.

D. Findings of Fact Nos. 5, 7, 8, 9, and 10 are irrelevant and immaterial by reason of the Supreme Court decision which held that plaintiff's knowledge of or consent to defendant's unlawful price control program was not a defense.

E. Findings of Fact Nos. 11 and 13 cannot be sustained in veiw of the applicable law in existence as of 1954, and of the statement in the Supreme Court opinion that Union Oil was asking for an extension of General Electric.

F. Findings of Fact Nos. 12, 14 and the findings incorporated in No. 15 are erroneous because the record does not support the conclusions set forth therein; the record rather showing that General Counsel left the coercive features of the program to marketing and performed a cursory analysis of the fields of law applicable to the price control pogram.

V. The orders and judgment of the Trial Court conflict with the United States Constitution, Article I, and Amendments V and VII, and with the doctrine of separation of powers.

VI. The Trial Court erred in granting the defendant's motion to set aside the verdict and granting a new trial, in that the verdict was in accordance with the evidence and with argument of counsel permitted by the Court.

VII. The Trial Court erred in not striking the affidavits of jurors Smith and Price and the declaration of juror Grigon.

VIII. The Trial Court erred in not allowing appellant to prove violations of Section 2 of the Sherman Act and of Section 1 of the Sherman Act in that the Retail Dealer Consignment Agreement program involved unlawful tie-ins of the sale of petroleum products to real property interests, constituted exclsuive dealings in gasolines, and was an attempt to monopolize the wholesaling and retailing of petroleum products.

SUMMARY OF ARGUMENT

On April 20, 1964, the Supreme Court of the United States held that appellant Richard S. Simpson had suffered actionable wrong at the hands of appellee Union Oil Company, through the latter's coercive imposition of a retail price maintenance system on its dealers. Simpson v. Union Oil Co., 337 U.S. 13 (1964). The cause was remanded to the District Court for trial on the remaining issues.

The Court split 5-3 on the scope of the remand. The dissenter, Mr. Justice Stewart, relying on the conclusion that Union's marketing contract was in form a bona fide consignment agreement, did not think that a Sherman Act violation could be found on the record in summary judgment, and would therefore have withheld judgment until after a trial on all issues. The opinion of the Court, however, followed its previous decisions in Standard Oil Co. v. United States, 337 U.S. 293 (1949), and in United States v. Masonite Corporation, 316 U.S. 265 (1942), and held that appellee had violated the Sherman Act, and had, in so doing, engaged in conduct which created a cause of action in Simpson under Section 4 of the Clayton Act, regardless of his ability to deal elsewhere.

What provoked the split was that Mr. Justice Douglas' majority opinion consists of two parts: (1) the holding, based on settled principles, that it was unlawful for Simpson's supplier-lessor to lace him into a coercive price fixing scheme, cf. United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441 (1922) and (2) the announcement that retail price

control, covering a vast distribution system involving many independent outlets is unlawful regardless of whether the pricing agreements are denominated consignments and regardless of whether coercive devices are employed. Justice Stewart, apparently not in sympathy with the court's finding of coercion upon a record based upon motions for summary judgment in Simpson, supra, would have held that bona fide consignment legitimizes resale price control whether or not the supplier was enforcing resale price restrictions on unpatented articles.

In the last sentence of the opinion, the justices who made up the majority answered Justice Stewart's fears that the Simpson decision would bring before the Court bona fide consignment systems, not coercive, and entered into in reliance on United States v. General Electric Co., 272 U.S. 476 (1926), by reserving the question of retroactivity in cases affected by the broader Simpson rule, but did not retreat from their holding.

On remand, the district court failed to distinguish between the form of Union's consignment agreement and the coercive application of its retail price maintenance policy as found by the Supreme Court. Treating appellee, which had been the subject of the Simpson holding, as it were another litigant altogether, the court below decided that Justice Douglas' reservation of the retroactivity vel non of the rule he announced obiter was really an invitation to the trial cort to refuse to apply the Simpson holding in the case of Simpson himself. That misconception is the primary subject of this appeal.

Specifically, the judgement below dismissing appellant's

suit as "inequitable" after rendition of a jury verdict in appellant's favor is erroneous for at least six reasons:

(1) It represents the creation of a new affirmative defense which cannot reasonably be read into the Sherman Act, and is thus contrary to the will of Congress and to separation of powers.

(2) It is not consistent with the limitation placed by the Seventh Amendment on the power of a trial judge to review a verdict which is within the range of the evidence, as embodied in Rule 50.

(3) It attributes to the Chancery side of the court a general supervisory power over the law without regard for the jurisdictional bases of equitable relief from the operation of a judgment.

(4) It takes from Simpson the relief accorded him by a higher forum by applying at the trial level the appellate doctrine of "pure prospectivity," which has never been invoked in any federal court to deprive a successful appellant of the fruits of his appeal.

(5) It is based on a finding of "equities" which cannot be sustained on the record of this case, and which is contrary to the announced findings of the Supreme Court with respect to relations between the parties.

(6) It conflicts with the District Court's own ruling on appellee's motion for judgment non obstante verdicto, which was the only appropriate basis for attack on the jury verdict.

appellee a new trial is erroneous for two reasons:

(1) It represents a mere substitution of the court's determination of factual issues for that of the jury where ample evidence was duly admitted to sustain the verdict, which was well within the range of damage figures argued by appellant's counsel. Appellee respectfully submits that recitation by a trial judge of such phrases as "monstrously excessive" is not talismanic in the appellate courts, which should oversee orders for new trial so far as is necessary to preserve the integrity of the jury system.

(2) When the ruling was made the court had before it the affidavits of three jurors solicted by counsel for appellee, seeking to impeach the verdict by revealing the process of deliberation of the jurors. Regardless of whether these were consciously considered by the court below, the fact that they had not been struck at the time it ruled on appellee's motion for a new trial renders its ruling erroneous because of potential prejudice.

* * *

The United States Constitution prohibits the federal courts from refusing to enforce actions which the Congress has established to remedy wrongs done by huge aggregations of wealth against a citizen. Northern Sec. Co. v. United States, 193 U.S. 197, 348-357 (1904).

facts, subject only to the rigorously limited review developed by the common law. U.S. Const. art. VII. As Simpson has proven every element of a federally created cause of action, he is entitled to legal processes which do not violate his rights so established. Id. art. V.

The Supreme Court in Linkletter v. Walker, 381 U.S. 618, 632 (1965)(denying retroactive application of Mapp v. Ohio), specifically noted the difference between the party who merely proposes a judicial policy and the party who shows the court that his federally created right is being violated.

Here, at the time of the wrong, appellee was violating the antitrust laws by engaging in manifestly coercive conduct which flew in the face of United States v. Richfield Corp., 99 F. Supp 280 (S.D. Cal. 1951), aff'd per curiam, 343 U.S. 922 (1952), and of United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Union Oil Company sought to treat independent business as employees under a price fixing scheme which did not tolerate any independence on the part of lessee dealer operators. The Supreme Court, in Federal Trade Comm'n v. Beech-Nut Packing Co., supra, and United States v. Masonite Corp., supra, had taught that price fixing arrangements which effect coercion of independent dealers were violative of the antitrust laws regardless of whether there were any agreements or whether the agreements utilized were couched in terms of agancy or consignment. Union Oil Company was fully subject to the strictures of law as explained in United States v. Parke, Davis & Co., supra. A wrong was done

Simpson under the antitrust laws, and by congressional fiat his remedy is certain.

The Supreme Court cannot be presumed to have allowed Union Oil Company to show equities against Mr. Simpson. He lost his business after overt coercive threats had been made, and after he was warned that he did not have the means to sue Union Oil Company. He was told he could have his business if he conformed to Union Oil Company's pricing practices.

The Supreme Court has been outspoken in its declarations that the federal antitrust laws cover coercive arrangements between major oil companies and dealers, who do not bargain as equals. Standard Oil Co. vs. United States, supra; accord, United States v. Richfield Oil Corp., supra; Atlantic Ref. Co. v. Federal Trade Comm'n, 381 U.S. 357 (1965); Federal Trade Comm'n v. Texaco, Inc., 381 U.S. 739 (1965) (per curiam). The judgment below ignores the purpose of the Sherman Act, as enunciated by the Supreme Court, to remedy overreaching by those who possess coercive levers. The economy is for the benefit of all and not only for those who maintain the instruments of control.

The decision below narrowly focuses on, then misinterprets, the last sentence of the Simpson decision. Taken in the context of the last paragraph and of the entire opinion, it was clearly not to be applied against Mr. Simpson. The elementary fact which appellee has persistently ignored is that the Simpson holding overruled nothing. General Electric, 272 U.S. 476 (1926), had been limited to the field of patents in Masonite, supra, and Masonite announced the Sherman Act

to cover restraints of trade. Antitrust liability was there declared to rest, "not on the skill with which counsel has manipulated the concepts of sale or agency, but on the significance of business practices in terms of restraint of trade." 316 U.S. at 280. Thus General Electric was known not to be decisive in Sherman Act litigation. It would certainly not cover a coercive scheme. See United States v. Richfield Oil Corp., supra. Clearly at no time was the effect of General Electric to allow the subjection of small dealers to a coercive price control program by their landlords.

Only the Supreme Court could make a determination of pure prospectivity of its own decision. The appellate forum alone determine the prospectivity of the rules it announces: as the Supreme Court stated, "We reserve the question . . . " There was thus no power below to enter a judgment dismissing plaintiff's complaint.

But even taking the paradoxical position that the District Court was to determine the prospectivity of the Simpson decision in Simpson's action, there should have been a different result under the tests established in Linkletter v. Walker, supra. The judgment below is simple nonenforcement of federal antitrust law and retards its operation. The Simpson decision would stand as proof that the appellee is correct in its warning to Mr. Simpson, "What can you do about it . . . You haven't got the money to make trouble and fight the Union Oil Company."

The second section of appellee's brief shows that

the Findings of Fact below are erroneous, for they are either in conflict with the Supreme Court's decision in Simpson, are not based on the record, or are irrelevant under the Simpson holding that Simpson's knowledge and consent to the consignment agreement did not bar his cause of action. The District Court relied on findings that Union Oil Company, in the preparation of the Retail Dealer Consignment Agreement Program followed the advice of its General Counsel, who had read General Electric and who authorized the use of the consignment agreements. But whether or not the dealer was to be free in accepting the agreement, or in testing it by experience and later rejecting it, and the role of lease ouster in the program were not subjects of Genral Counsel's advice; he left such matters to marketing.

Union assumed the antitrust risks of the consignment program. The record showed Union as a powerful company which risked Department of Justice complaints in the governments monopoly and price fixing case against it and which utilized consignment despite Congress' recommendation in 1957 that the Department of Justice investigate consignment programs as possible violations of the antitrust laws. Union Oil Company did not tell the investigating House subcommittee that its Retail Dealer Consignment Agreement Program was a mandatory price control program. It had reason to fear that candor would bring about the antitrust consequences which were finally produced in the Simpson decision. Federal Trade Commission action against two major oil companies followed the subcommittee report. As the Court is aware, the case entitled

Federal Trade Comm'n v. Sun Oil Co., 3 Trade Reg. Rep. 24,542 (FTC 1963), was based on the coercive features of a consignment program, see 311 F.2d at 789 n.6, although the Seventh Circuit enforcement order relied on its horizontal aspects, see 350 F.2d 624 (7th Cir. 1965). Union Oil Company was gambling under the antitrust laws and was not acting in reasonable belief that its consignment program was wholly lawful.

In appellant's third section it is argued that the District Court erred in granting a new trial and in not striking the jury affidavits of two jurors and the declaration of a third. The jurors were solicited by defendant, who sought to determine what occurred in the jury room. Such conduct was unethical and the court should have stricken the affidavits. See Southern Pac. Ry. Co. v. Mely, 219 F.2d 199 (9th Cir. 1954). Appellee sought improperly to influence his ruling on the matter for a new trial.

The new trial was granted on an expressed belief in excessiveness of the jury verdict. But the verdict was well within the range of proven damages. Simpson was entitled to damages for a wrong which deprived him of the value of his business. This business was valued on the basis it would have continued at least twenty-four years, based on Simpson's remaining useful life as owner, and the profits established by Simpson in the business were in the record. (See Tr. 274-278) The evidence admitted by the trial court were valuations of Simpson's business of between $147,895.00 and $211,970.00. These were projections made by a qualified Professor of Statistics.

ARGUMENT

I. THE MANDATE OF THE UNITED STATES SUPREME COURT IN SIMPSON v. UNION OIL COMPANY OF CALIFORNIA DID NOT ALLOW THE DISMISSAL OF APPELLANT SIMPSON'S COMPLAINT WITH PREJUDICE.

A. The Last Sentence in the Simpson Opinion Did Not Apply to the Successful Appellant, Simpson.

1. The courts are prohibited by the Constitution to refuse to enforce a cause of action created by Congress.

a. Under the doctrine of separation of powers, the trial court could not determine whether the Sherman Act, as interpreted by the Supreme Court, should apply to Union Oil Company of California.

Union Oil Company engaged in violation of Section 1 of the Sherman Act when it coerced independent dealer's judgments as to prices, effect a price fixing combination and destroyed the businesses of independent dealers who failed to obey price orders. The courts are without power under the United States Constitution, requiring the separation of powers between legislature and the Courts to take away or

render nugatory a federally created right to obtain damages for an injury from a defendant's violation of the Sherman Act.

It was stated in Northern Securities Co. v. United States, 193 U.S. 197 (1903), in answer to the argument that the Sherman Act could not interfere with state charters:

> "By its very terms the act regulates only commerce among the states, and with foreign states. Viewed in that light, the act, if within the powers of Congress, must be respected, for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions, are the supreme law of the land 'anything in the laws of any state notwithstanding' -- supreme over the states, over the courts, and even over the people of the United States -- the source of all power under our governmental system in respect of the objects for which the national government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the states and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the

feet of local authority. Cohen v. Virginia, 6 Wheat. 264, 385, 414, 5 L. 3d. 257, 286, 293. These views have been often expressed by this court." 193 U.S. at 333.

The right to private relief for a wrong done under the Clayton Act is designed to give a federal remedy for personal injury caused by violators of the antitrust laws, against whom the maintenance of a private suit is particularly difficult. See Cong. Rec. 2456 (1890)(remarks of Senator Sherman)

As stated in City of Atlanta v. Chattanooga Pipe & Foundry Co., 127 Fed. 23 (6th Cir. 1903), aff'd, 203 U.S. 390 (1906):

> "That such a plaintiff is entitled to recover the damages thus sustained in his business, whatever its character, would seem to be the plain purpose of the seventh section of the law of Congress, under the logic of the decision in Addyston Pipe Co. v. United States. It is possible to so construe this seventh section as to devitalize this section by confining compensatory relief to such relief to such persons as shall sustain injury in some interstate business whose volume or profit has been diminished. But this construction does not seen consistent with the wide economic purposes of Congress, as manifested by the whole tenor of the act. Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage

to 'any person' 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act.' If Congress had the power to declare unlawful a combination which was intended to restrain interstate commerce by enhancing the value of a commodity when the subject of interstate commerce, it had the power to give a compensatory remedy to any person directly affected by the unlawful agreement.

* * *

"... The seventh section alone gives any remedy to one injured by such a forbidden combination or contract, and that measures the relief by the 'damages by him sustained,' costs of suit, and his reasonable attorney's fees. The remedy is not given to the public, for no one may bring the action save the person 'who shall be injured,' etc., and the recovery is for the sole benefit of the person so injured and suing." 127 Fed. at 27-29.

Appellant's record shows that he has established each element of his cause of action under Section 4 of the Clayton Act allowing him recovery of damages. The Supreme Court has held that Union Oil Company violated the Sherman Act and the jury found that Mr. Simpson was damaged by said violation in the amount of $160,000.00. Congress alone can provide for remedial relief under the Sherman Act. The Courts are required

to enforce Sherman Act remedies. The Supreme Court may not be presumed to have usurped Congress' role as the creator of wrongs and remedies arising thereby. As stated in Bruce's Juices v. American Can Company, 330 U.S. 743 (1947):

> "It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any party a private cause of action in which his damages to be made good threefold, with costs of suit and reasonable attorney's fees." 330 U.S. at 751-752.

Congress has declared the law and established the remedy; it is respectfully urged that the courts are not to interfere with this Congressional scheme. See Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Radovich v. National Football League, 352, U.S. 445 (1957); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); Prospective Overruling & Retroactive Application In The Federal Courts, 71 Yale L. J. 907, 930-933 (1962).

b. Simpson's right to relief has been denied him despite a proven wrong and damages suffered. Such denial deprives Simpson of due process of law under the United States Consti-

tution, Fifth Amendment.

The result below has completely deprived Mr. Simpson of his remedy. See Bruce's Juices v. American Can Company, supra. Simpson's only source of recompense was an action under the antitrust laws, and to deny him that redress after the statute of limitations has run is to deprive him of all rights to relief arising from a proven wrong. It is respectfully submitted that such a deprivation of rights violates due process of law. A person injured within the meaning of federal law cannot be constitutionally denied his existing remedy. See Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1929). The law was certain that a person who has had his business destroyed by a violation of the antitrust laws possesses a remedy. This remedy cannot be retroactively denied appellant, who has been declared the victim of a compensible wrong in the highest court of the land.

c. A jury trial must be granted on all facts affecting Simpson's right to relief.

That the result below is based upon findings of fact by the trial court in a jury action, it is respectfully urged, further shows that the Supreme Court mandate did not sanction the result below. The necessary result of what occurred is to place the judiciary above the jury as the trier of fact, but under our constitutional system the jury alone determines the facts upon which liability or nonliability is determined. Only where there appears retrospectively from want of evidence to have been no issue requiring factual deter-

mination may a jury verdict be ignored and a party's complaint dismissed. Compare Baltimore & Car. Line v. Redman, 295 U.S. 654 (1935), with Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913). The narrow window which Rule 50(b) places in the Seventh Amendment does not admit general review of "equities." See Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940)(by implication).

It is respectfully urged that the judiciary has no general supervisory power over the jury under our constitutional system. The ascendancy of the jury system over trials in which persons and their civil causes were not judged by their peers would seem a fundamental benefit achieved by the American Revolution. It is ingrained in our Constitution, which expressly forbids a court to disregard a jury verdict except as limited by the development of the common law. U.S. Const., amend. VII.

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

The result below is not consistent with this stricture. See Fitzgerald v. United States Line Co., 374 U.S. 16, reh. denied., 375 U.S. 870 (1963); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); cf. 28 U.S.C. Sec. 2072 (1964); Fed. R. Civ. P. 38(a); Galloway v. United States, 319 U.S. 372 (1943); Hodges v. Easton, 106 U.S. 408 (1882).

It is respectfully submitted, therefore, that the United

with means of retribution when they are the victims of ouster to support price control programs, and the courts may not constitutionally vitiate these congressional rights. U.S. Const. art. I, Sec. 1; id., art. III, Secs. 1 & 2; id., amend. V & VII. The interpretation given to the last sentence in the Simpson case by the court below, therefore, imputes to the Supreme Court a sweeping constitutional revision which would obliterate Mr. Simpson's federally created rights. Such an interpretation, which is completely contradictory to and inconsistent with the Supreme Court's opinions in antitrust litigation, must be faulty. The United States Supreme Court did not anticipate creating a situation where a litigant in pursuing his rights under a federal law must watch a jury verdict being taken away from him by a federal court after he has proven each and every element necessary to sustain his cause of action. Much less did it intend, when it remanded the case, to deprive the litigant whose very cause of action it sustained of a verdict based on the law of his case.

d. The Supreme Court cannot be presumed to allow equities to a coercive scheme carried out by appellee.

The Supreme Court has been outspoken in its declaration that the antitrust laws cover the restrictions in trade and commerce carried out as a result of the inequality of bargaining power between service station dealers and the major oil companies in the United States. In addition to the

Simpson opinion; see Atlantic Ref. Co. v. Federal Trade Comm'n, 381 U.S. 357 (1965), where the Supreme Court stated:

> "Certainly there is 'warrant in the record' for the findings of the Commission here. Substantial evidence supports the conclusion that notwithstanding Atlantic's contention that it and its dealers are mutually dependent upon each other, they simply do not bargain as equals. Among the sources of leverage of Atlantic's hands are its lease and equipment loan contracts with their cancellation and short-term provisions. Only last Term, we described the power implications of such arrangement in Simpson v. Union Oil Company of California. 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed 2d (1964), and we need not repeat that discussion here. It must also be remembered that Atlantic controlled the supply of gasoline and oil to its wholesalers and dealers. This was an additional source of economic leverage, United States v. Lowe's, Inc., 371 U.S. 38, 45, 83 S.Ct. 97, 102, 9 L.Ed 2d 11 (1962), as was its extensive control of all advertising on the premises of its dealers." 381 U.S. at 368.

Accord, Federal Trade Comm'n v. Texaco, Inc., 381 U.S. 739 (1965), vacating per curiam 336 F.2d 754 (D.C. Cir. 1964); United States v. Richfield Oil Company, 343 U.S. 92 (1952), aff'g per curiam 99 F. Supp. 280 (1951).

It is respectfully submitted therefore that the United

means to retribution when they are the victims of lease ouster to support price control programs, and that the doctrine of separation of powers the courts may not constitutionally vitiate these congressional rights. See U.S. Const. art. I, Sec. 1, id., art III, Secs. 1 & 2. The interpretation given below to the last sentence in the Simpson case therefore imputes to the Supreme Court an unconstitutional interference with Mr. Simpson's federally created rights and is manifestly inconsistent with the Supreme Court's realistic view of the dealer's bargaining position with the major oil companies.

2. The decision of the United States Supreme Court in Simpson v. Union Oil Company reserving prospectivity did not apply to Simpson as a matter of reasonable interpretation.

The Supreme Court decision itself does not authorize, and is not susceptible of authorizing, the action taken below. The remand was for a jury trial in which Simpson could establish his damages based upon the violation of Section 1 of the Sherman Act by Union Oil Company of California, as found by the Supreme Court. Nowhere in the mandate is there a license for the District Court to refuse to enforce a jury verdict which was entered in accordance with the Supreme Court ruling of April 20, 1964. It is respectfully urged that the last sentence on the Simpson opinion refers only to

the Simpson decision would have upon other litigants in other factual situations.

The United States Supreme Court has simply asserted its appellate jurisdiction to govern the scope and extent of its rule against price fixing by consignment devices as applicable through the entire commercial world. This is made clear by contrasting the majority decision with the dissenting opinion of Justice Stewart. The simple answer of the majority to Justice Stewart's contention that the Supreme Court was injecting "severe uncertainty into commercial relationships established in reliance" upon its prior decisions was that the equities could be shown in other consignment type cases as they arose on their factual records. This is the correct interpretation for the following reasons:

(1) The Supreme Court found a violation of the Sherman Act through the use of price fixing agreements, coercively employed. Cf. Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441 (1922). The Supreme Court did not thereupon allow a trial in which a litigant proves a cause of action under a federal statute enacted for his protection by proving the loss of his business by coercion and ouster only to have the cause of action not enforced.

(2) The last sentence uses the words "damage suits". It is respectfully urged that that phrase shows the obvious purpose of the Supreme Court to reserve equities to other cases, in which the consignment device

may have been employed.

(3) The Supreme Court did not use the term "purely prospective". The Supreme Court utilized the word "prospective" in its last sentence. This means that the decision applied to the parties before it. See Linkletter v. Walker, 381 U.S. 618 (1965), where the Court at 622-623 set forth its terminology:

> "Initially we must consider the term "retrospective" for the purposes of our opinion. A ruling which is purely prospective does not apply even to the parties before the Court. See, e.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). See also Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932). However, we are not here considered with pure prospectivity since we applied the rule announced in Mapp to reverse Miss Mapp's conviction. That decision has also been applied to cases still pending on direct review at the time it was rendered." (omitting Court's footnotes).

(4) The interpretation given by the court below denies in effect, that the Supreme Court rendered a decision as to the parties before it. It is the universal rule of the courts that their decisions resolve the disputes of the parties before them. The England and Sunburst cases, cited obiter in Linkletter v. Walker, supra, are not to the contrary. Even if the Supreme Court had overruled

Simpson, the district court's action would be without precedent in the federal system.[1] Cf. Annot., 14 L. Ed. 2d 993, 1002 (1966). For illustration of the distinction between the successful appellant in the federal courts and subsequent litigants, compare Nye v. United States, 313 U.S. 33 (1941), with Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941).

The effect of the trial court's order below was to make the Supreme Court decision purely gratitous, solely advisory and without remedial effect. This interpretation is clearly erroneous and cannot be sustained. Mr. Simpson lost his business and filed his complaint under the antitrust laws. It is that complaint and that dispute which were determined by the Supreme Court mandate in this case and which finally resuled in the jury determination. A decision on the merits requires that the party bringing the case obtain the benefits of the decision it has won. Dooling v. Overholser, 243 F.2d 825, 829 (D.C. Cir. 1957)(reviewing authorities); Molitor v. Koveland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89, 97 (1959)(by implication).

(5) The interpretation below is contrary to sound judicial administration and to public policy. The Supreme Court has stated that it would not render a decision retroactive when to do so would interfere with the integrity of judicial process. Linkletter v. Walker, supra. Clearly,

[1] Hanover Shore, Inc. v. United Shoe Mach. Corp., 377 F.2d 776 (3d Cir.) cert. granted, 88 S.Ct. 86 (1967), involves retroactivity of a decision obtained by the government in a subsequent suit by a different litigant.

ment of the Sherman Act through private action.

In Simpson, unlike Linkletter, the Court is enforcing the federally created right itself, not delving into the realm of judicial administration. Mr. Simpson's position is thus that of Mrs. Mapp, rather than that of Victor Linkletter. But even if this were not so, sound judicial administration requires reversal, for failure of the federal courts to enforce the verdict in Simpson's favor is contrary to the prevailing test as stated in Linkletter.

> "...[W]e must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether prospective operation will further or retard its operation." 381 U.S. at 629.

The refusal of the federal court below to enforce the verdict in favor of Simpson will, without question, retard enforcement of the antitrust laws. It will allow major oil companies and especially this defendant to show the dealers that the antitrust laws are a flimsy thing, and that dealers can obtain no relief or remedy even after a Supreme Court holding of violation. This result is completely antagonistic to the will of Congress and certainly cannot be sanctioned as a prevailing doctrine.

Pure prospectivity here interferes also with proper administration of justice and the integrity of the federal court system. One powerful corporation is allowed to assert

its immunity to antitrust litigation and make Simpson an example to the class that it is indeed foolish to sue the major oil companies.

B. Even Assuming the Language of the Supreme Court as to Prospectivity Was Applicable to Mr. Simpson, the Trial Court Had No Jurisdiction Under That Mandate to Dismiss Plaintiff's Complaint, Since the Matter Was Reserved to the Supreme Court of the United States.

It is respectfully submitted that, assuming the last sentence of the Supreme Court's opinion did refer to Simpson v. Union Oil Co., the Supreme Court only intended to review the record itself before a final decison as to prospectivity was made. The result below was not sanctioned. Whether or not the Supreme Court decison in Simpson is retrospective or prospective is a matter for determination by that forum; it alone has power to determine the effect of its opinion.

The Supreme Court expressly reserved to itself alone the effect of the Simpson decision. The trial court could not convert a doctrine of appellate review into an order or judgment denying Simpson relief and awarding costs against him. 21 C.J.S. Courts Sec. 194 (1940, Supp. 1967); 20 Am. Jur. 2d Courts Sec. 233, at 562 (1965, Supp. 1967). The most the trial court should have been done was to allow Union Oil Company to open the record for any taking of evidence that would aid or assist the Supremem Court in determining whether or not there were any equities in accordance with its opinion.

II. FINDINGS OF FACT BELOW UPON WHICH THE JUDGMENT DISMISSING SIMPSON'S COMPLAINT WERE BASED ARE IMMATERIAL OR ERRONEOUS. THERE ARE NO EQUITIES IN THIS RECORD IN FAVOR OF DEFENDANT UNION OIL COMPANY.

The findings of fact below are in conflict with the United States Supreme Court opinion in Simpson v. Union Oil Co., 377 U.S. 13 (1964), or are immaterial, or are erroneous:

1. Finding of Fact Number 1:

Finding of Fact Number 1 is in conflict with the Supreme Court decision. The purpose of Union Oil Retail Dealer Consignment Agreement program was to control retail prices. (See R. 223-224) The Supreme Court stated in pertinent part as follows:

> "By reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices might otherwise be competitive.
>
> "The evil of this resale price maintenance program . . . is its inexorable potentiality for an even certainty in destroying competition in retail sales of gasoline by these nominal 'consignees' who are in reality small struggling competitors seeking retail gas customers."

The record does not support a finding that the retail dealer consignment agreement program was used other than to fix and control the dealers' prices. Plaintiff's Exhibit Number 3, dated March 9, 1955, is decisive. This letter states, in part:

> "So there will be no misunderstanding, the following information is presented to supplement the information contained in our first letter: A change in our selling price is necessary because of our two new Gasolines whenever we decide to drop our fair trade price, appoint our dealers as consignment agents and nominate the price for which they are to sell our Gasoline." (R. 231)

2. Finding of Fact Number 2:

Finding of Fact Number 2 stating that the General Counsel of Union Oil Company was entirely satisfied that under United States v. General Elec. Co., 272 U.S. 476 (1926), and decisions following consignment and the proposed method of merchandising were lawful in every respect and would not violate the antitrust laws, is not in accordance with the record. It is respectfully submitted that Mr. Gibbons, the General Counsel referred to in Findings of Fact No. 2 did not testify consistently with that finding. The substance of Mr. Gibbon's testimony is that he was asked by Mr. A. L. Stewart, Vice President in charge of Marketing,

about 1954, whether or not Union Oil Company could consign gasoline and tell the dealers what they should sell gasoline for. (Tr. 1141-1444) Mr. Stewart and Mr. Gibbons did not discuss what Union Oil Company would do as to dealers who do not want to sell under a consignment agreement (Tr. 1152), and did not discuss the effect of the one-year lease and of Union's ability to use it as a means of obtaining consignment agreements from the dealers and subsequent compliance therewith. (Tr. 1152, 1164) There was no discussion as to the ability of a dealer to convert to purchase and sale should he disagree with the consignment agreement policies. (Tr. 1176) There was no discussion as to whether Union Oil Company had the right under the dealer consignment program to threaten dealers that they would do everything in their power to force the dealer to charge the retail prices told to be posted under the consignment programs. (Tr. 1180) According to the testimony of Mr. Gibbons these matters were left to marketing for implementation. (Tr. 1176) He could not know whether even the cases he did read were apposite to Union's actual practices. Clearly, the method of merchandising actually used by Union Oil Company involved crucial features discussed in the Supreme Court opinion which were not even the subject of legal approval by Mr. Gibbons. There are at least eight elements of the retail dealer consignment program, as follows:

(1) The retail dealer consignment agreement itself. This agreement was not offered by allowing the dealer to accept the agreement on the basis of his inde-

pendent judgment. Union Oil Company required the dealer to accept consignment (Tr. 372, 391-395)

(2) Union Oil determined to do away with dealers, independent decisions in the matter, requiring dealers to agree to retail dealer consignment agreement as a condition to lease occupancy. This was stipulated. (Tr. 391)

(3) Union Oil adopted a mandatory price control program and did not allow a dealer lease renewal unless he agreed to remain a consignee whose prices were fixed by Union Oil Company. This is also stipulated. (Tr. 395) In other words, there was no opportunity for the dealer to change his decision and to become a purchase-and-sales dealer or otherwise acquire gasoline by Union Oil Company.

(4) Union Oil utilized the consignment agreement to dictate prices and set in motion an arrangement under which it would impose non-competitive prices on thousands of persons whose prices might otherwise be competitive. Thus, Union Oil Company told the dealer that his price was to be "higher than major competition or equal to those charged by Standard Stations, Inc." (See Pl. Ex. Nos. 38, 46; R. 75; cf. R. 232, 247, 256, 283)

(5) The dealers were told that Union Oil Company would do all in its power to compel them to follow the consignment price. (Tr. 606-607: compare Tr. 719); Answer to Amended Compalint, R. 93)

(6) Union Oil would inform the dealers that if they did not go along with the authorized price that a one-year lease renewal would be refused. (See Tr. 617, 708,

(7) Union Oil Company would refuse to issue a lease to the dealer who decided to charge other than authorized prices. (By stipulation, Tr. 391-395) It is stipulated, of course, that Mr. Simpson's lease was not renewed because he would not agree to charge the consignment prices. (Tr. 471)

(8) The dealers were told that they had better not sue Union Oil Company, that they did not have enough money to litigate with Union, and that other dealers had been thrown out bodily when they failed to leave the service station site at Union Oil's demand. (Tr. 622-623)

Thus, it is respectfully urged that Mr. Gibbons' testimony reflected only upon the first factor above, the Retail Dealer Consignment Agreement itself and, that he has in fact admitted during cross-examination, the coercive features of the program were not subject to his analysis, being the result of appellee Union Oil Company's implementation of the program through its "marketing people".

Moreover, the findings could not state that counsel studied the then state of the antitrust laws, for cross-examination of Mr. Gibbons clearly showed he did not analyze United States v. Richfield Oil Corp., supra, in terms of Union Oil's consignment program (Tr. 1159), that he did not rely on the case of Federal Trade Comm'n v. Beech-Nut Packing Co., supra, (Tr. 1181) and that he did not believe the so-called tie-in cases to be applicable. (Tr. 1169) Further, the Supreme Court opinion in United States v. Masonite Corp., 316 U.S. 265, 280 (1942) that "so far as the Sherman Act

is concerned the result must turn not on the skill with which counsel has manipulated concepts of 'sale' agency, but on the significance of the business practices in terms of restraint of trade", was thought by Mr. Gibbons not to apply to Union Oil's proposed consignment agreement program because Masonite involved a horizontal conspiracy. (Tr. 1171-1173) This is at best legal attention only to the agreement itself.

It is thus respectfully submitted that the "then state" of the antitrust laws was not in fact analyzed as applicable to Union by General Counsel of defendant, wherefore Finding of Fact Number 2 cannot be supported.

3. Finding of Fact Number 3

Finding of Fact Number 3 is in direct conflict with the Supreme Court's decision in this case. This Finding states that the retail dealer consignment agreement used by Union Oil Company is substantially the same as the consignment agreement and arrangement of the General Electric Company involved in United States v. General Elect. Co., 272 U.S. 476 (1926). But the Supreme Court, on the contrary, said clearly that the retail dealer consignment agreement "somewhat parallels" the General Electric agreement, and determined that Union was seeking extension of the General Electric rule to protect its distinctively coercive program. See Simpson, supra, at 24. The Supreme Court went out of its way to indicate some of the respects in which it considered the Union Oil Company agreement different from the General Electric agreement. Id., 23 n.10. It noted that

the General Electric consignor assumed all the risks of fire, flood or obsolescene, whereas Union Oil did not. It noted that General Electric paid all taxes assessed on the stock of lamps, whereas Union Oil Company paid only property taxes. It noted that General Electric carried "whatever insurance is carried" on the stock held by the consignees while Union Oil Company apparentely was not obligated to carry any insurance. Significantly, Justice Stewarts dissent disagreed with the majority's observation that Union Oils consignment agreement failed to follow General Electric's and placed most of the risks on the consignee.

4. Finding of Fact Number 4:

Finding of Fact No. 4 is in conflict with the facts indicated and discussed under Findings of Fact Number 2, supra. The important matters of implementation of the Retail Dealer Consignment Agreement program were left to marketing and were not discussed with General Counsel. Finding of Fact No. 4 is thus in conflict with Mr. Gibbons' testimony at Tr. 1176.

5. Finding of Fact Number 5

Finding of Fact Number 5 is immaterial and irrelevant, and is contradictory to and inconsistent with the Supreme Court decision in Simpson. This Finding deems relevant the fact that plaintiff was entirely familiar with the form of the consignment agreement and with the form of lease used by defendant. But the plaintiff's knowledge or lack of knowledge of these matters was directly determined by the Supreme Court in Simpson to be irrelevant to plaintiff's

cause of action under Section 4 of the Clayton Act. See Findings of Fact Number 6, below.

6. Finding of Fact Number 6

Finding of Fact Number 6 is immaterial, irrelevant and conflicts with the Supreme Court decision in Simpson. This Honorable Court's opinion in Simpson v. Union Oil Co., 311 F.2d 764 (9th Cir. 1963), held that Simpson's knowledge that by obtaining the lease he would also have to sign a consignment agreement, and his subsequent signing of the agreement with such knowledge raised the doctrine of "Consent", and therefore destroyed his cause of action. But the Supreme Court was unanimous in holding that there was actionable wrong or damage to Simpson despite Simpson's knowledge of or consent to defendant's unlawful price control program. It is noted that the exclusive requirements contract struck down in Standard Oil Co. v. United States, 337 U.S. 293 (1949) were not saved because dealers need not have agreed to them, but could have gone elsewhere. The Supreme Court stated that if that were a defense, a supplier could regiment thousands of otherwise competitive dealers in resale price maintenance programs merely by fear of nonrenewal of short term leases. Simpson, supra, 377 U.S. at 17. The Supreme Court pointed out that United States v. Parke, Davis & Co., 362 U.S. 29 (1960), made clear that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. The Court held that the Retail Dealer Consignment Agreement was a retail price agreement, that it was used coercively, and that it promised to be equally if

not more effective in maintaining gasoline prices than were the Parke, Davis techniques in fixing monopoly prices on drugs. Simpson, supra, at 17.

The purport of Finding of Fact Number 6 is to make material plaintiff's signing of a lease and a consignment agreement and his familiarity with the terms and conditions of those agreements. Clearly, this is immaterial and irrelevant to plaintiff's cause of action, which is based upon injurious impact arising from Union Oil Company's promulgation and enforcement of a retail price maintenance program coercively used.

7. Finding of Fact Number 7:

Finding of Fact Number 7 is in direct conflict with the Supreme Court decision in Simpson. The Supreme Court has held that Union Oil Company engaged in coercive conduct in that its consignment agreements providing for retail price control were coercively used. As heretofore indicated, the dealer lost all freedom of choice as a result of Union Oil's conduct, since (1) a dealer could become a lessee only by agreeing to sign the consignment agreement; (2) he had no ability to secure another type of arrangement; (3) he was subjected to coercive statements and threats if he did not agree to follow Union's designated consignment prices; and (4) his lease would not be renewed if sought to establish his own retail prices. These are matters necessarily determined in the Simpson decision and preclude reaching a contradictory result on any finding that there is freedom of choice or free judgment exercised by plaintiff pursuant to

the defendant's unlawful price control program. It is economic duress or compulsion to utilize reversionary property interests to coerce judgments with respect to prices and products. Northern Pac. Ry. Co. v. United States, 365 U.S. 1 (1958); United States v. Richfield Oil Co., 343 U.S. 92 (1952).

Cf. Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), where the Court stated:

> "By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of the buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market." 345 U.S. at 603 (emphasis supplied).

As necessarily determined by the Supreme Court in this action, Union Oil used force and compulsion similar to that in United States v. Richfield Oil Co., 99 F. Supp. 280, 297 (C.D. Cal. 1951), where the court concluded:

> "(4) The 24-hours' termination clause has been used as an instrumentality to force upon the lessee of L-O [leased out] stations illegal restrictions as to the types of petroleum and sponsored tires, batteries and accessories to be handled on the premises."

In Simpson's case,

> "[b]y reason of the lease and 'consignment' agreement, dealers are coercively laced into an arrangement which their supplier is able to impose

noncompetitive prices on thousands of persons whose prices otherwise might be competitive." 377 U.S. at 21.

8. Finding of Fact Number 8:

Finding of Fact Number 8 is immaterial and irrelevant, is in conflict with the decision of the Supreme Court in Simpson and is factually incorrect for the reasons set forth in discussion of Findings of Fact Numbers 6 and 7. The truth of the matter is, however, that Mr. Simpson did follow the Union Oil consignment prices for the most part until the March 1958 price dispute. (See Tr. 796-796)

9. Finding of Fact Number 9

Finding of Fact Number 9 is not supported by the record, is mistaken, is in conflict with the Supreme Court decision in Simpson and contradicts the jury verdict in favor of Simpson. The reason Union Oil Company refused to renew Mr. Simpson's lease was because it was carrying out an unlawful price control program and pursuant to that program it would not allow Mr. Simpson to be a conspicuous example to other dealers who might desire to charge retail prices in accordance with their independent judgment. Finding of Fact Number 9 completely ignores the threats made to Mr. Simpson, the attempt to have Mr. Simpson follow Union Oil's prices under the offer of lease renewal if he did so, and the threats to Mr. Simpson that he had better not engage in litigation against Union Oil Company. (Tr. 617-623) The jury verdict conclusively establishes that Mr. Simpson suffered damage by the acts of Union Oil Company. This finding stands as a

unwarranted to substitution of facts found by the jury and is therefore erroneous.

Further, as heretofore seen, General Counsel's opinion that the consignment agreement was lawful does not meet the issue as to whether or not Union did believe that prices under the agreement could lawfully be enforced by lease non-renewal and by threats against the dealers. Further, explicit in the Supreme Court opinion is a determination that Union's refusal to renew leases, enabling it to enforce price fixing orders, is a coercive device, is hence unlawful, and allows the party subject to such coercive conduct a right to his damages. Since Finding of Fact Number 9 purports to immunize Union Oil Company from an action to redress the wrong it committed it is in direct conflict with the Supreme Court decision finding an actionable wrong to Simpson.

10. Finding of Fact Number 10.

Finding of Fact Number 10 is immaterial, irrelevant and in direct conflict with United States Supreme Court decision.

As heretofore indicated in discussing Findings of Fact Numbers 6, 7 and 8, whether or not plaintiff breached his contractual duties is in conflict with the Supreme Court decision. Further, Finding of Fact Number 10 is incorrect since Mr. Simpson made it clear that he did not want consignment. (Tr. 608-609) It is noted that under general law a factor may at any time renounce an agency. See 35 C.J.S. Factors Sec. 7 (1960, Supp. 1967).

11. Finding of Fact Number 11

Finding of Fact Number 11 is in conflict with the

Simpson decision, and is incorrect as a matter of law and of fact. It is respectfully submitted that the teachings of General Electric were as set forth in the Simpson decision. The Supreme Court in Simpson stated that General Electric, involving patents, was not apposite to the special facts in Simpson. The Court pointed out that General Electric stood within a series of cases which allowed price fixing in the marketing of patented articles, that patent law was the ratio decidendi in General Electric, and that Union's attempted extension of these decisions to the area of the general marketplace was inappropriate.

It is apparent that United States v. Masonite Corp., 316 U.S. 265, 276-278 (1942), completly undermined any contention that the consignment form is pivotal by authority of General Electric, and put businessmen on notice that their programs would be viewed under the test of "not on the skill with which counsel has manipulated the concepts of sale and agency but on the significance of the business practices in terms of restraint of trade" 316 U.S. at 280. Furthermore, United States v. Socony Vacuum Oil Co., 310 U.S. 150, 221-222 (1940), made it clear that Section 1 of the Sherman Act does not tolerate agreements for retail price maintenance. Nor could a company with the substantial number of retail outlets and real property interests held by Union Oil Company tie price fixing agreements to the leasing of property. See Northern Pac.Ry. Co. v. United States, 356 U.S. 1 (1958); United States v. Richfield Oil Company, 343 U.S. 922 (1952), aff'g per curiam 99 F. Supp. 280 (1951).

It becomes clear upon examination of the foregoing authorities that the general and uniform view as expressed in appellate opinion was that the 1926 decision of the Supreme Court in General Electric was applicable only to in patent cases and was not authority as to price fixing arrangements in non-patented fields. Indeed, this court in Simpson assumed that the retail dealer consignment agreement program was unlawful, 311 F.2d at 767, and the district court's views initially were the same. (See R. 396, 399) Mr. Joseph Alioto, a prominent member of the antitrust bar, gave his expert opinion that counsel in analyzing the lawfulness of the Union Oil Company consignment agreement program should have examined the tie-in cases, refusal to sell cases, and the use of cancellation or refusal to renew cases, to produce a realistic judgment of the law, and that it was unreasonable not to do so. (Tr. 1442-1446) Since Mr. Gibbons testified that he did not explore these lines of cases, it is submitted that Mr. Gibbons' research was faulty. His cursory analysis of the state of the antitrust laws does not permit the conclusion that defendant's General Counsel acted reasonably and justifiably, as is set forth in Finding of Fact Number 11.

12. Finding of Fact Number 12

Finding of Fact Number 12 is incorrect and immaterial. United States v. Richfield Oil Company, gave notice that one could not use short-term leases to control the independent dealer's decisions as to prices and products. Judge Yankwich decided in 1951 that the dealer's judgment as an in-

dependent distributor could not be controlled by his supplier's use of short-term leases, 99 F.Supp. 280. This opinion was affirmed per curiam, 343 U.S. 922 (1952). Mr. Gibbons gave no opinion as to the use of the short-term lease to require the signing of consignment agreements and the obeying of consignment prices. This was "left to marketing". Finding of Fact Number 12 is incorrect.

In 1955 Subcommittee No. 5 of the Select Committee on Small Business of the House of Representatives recommended to the major oil companies that they issue three-year leases. (See Pl. Ex. 75 for ident., Tr. 1278) Further, at the time the consignment agreement program was promulgated, Union Oil Company was defending itself against charges by the United States that it had conspired to monopolize the petroleum industry in the Pacific States area and was fixing prices with major oil companies. (Def. Ex. P.) Union's consignment program received the attention of Subcommittee No. 5 in January, 1957. The Subcommittee undertook at this time to investigate and study the factors which since the hearings in 1955 might tend to impede the normal operations, growth and development of distributors, jobbers, consignees and retailers of petroleum and allied products, including automotive equipment and tires, tubes, batteries and accessories. The Subcommittee issued its interim report on August 14, 1957. H.R. Rep. No. 1157, 86th Cong., 1st Sess. (1957). The report specifically covered the investigation and complaints of price manipulations as practiced by some suppliers through company-owned, consignment or commission-operated outlets. The

Interim Report specifically referred to the testimony of Mr. Victor R. Hansen, Assistant Attorney General in charge of the Antitrust Division, Department of Justice, who testified directly,

> "Another issue relating to price fixing concerns certain of the practices which the major companies have used to preserve their tank-wagon price structure; for example, the placing of the dealer on a commission of consignment agency basis, which narrows his normal margin of profit and effectively fixes the retail price. This rather widespread practice is now directly at issue in the west coast oil case, specified in the amended complaint filed August 24, 1956. The problem of wholesalers' discriminating in prices between dealers is also at issue in that same case." Id. at 24.

This testimony is referred to in the United States Supreme Court decision, 377 U.S. at 19. Thus, at the very time Union Oil Company was fixing resale prices, it was in issue with the Department of Justice in the West Coast Oil case or using consignment to preserve the oil company's tank-wagon price structure. The prayer in the amended complaint in United States v. Standard Oil Co, supra, specifically asked:

> " ... that each defendant major [oil company] and each of its subsidiaries be enjoined from the operation, management or control of any service

station and from engaging in the business of selling refined petroleum products at retail even through its own employees or by any other persons designated as agents, consignees, or managers ... " (Def. Ex. P, para. 17, p. 47)

Subcommittee No. 5 in its Interim Report of August 14, 1967, had requested:

"... The Department of Justice [to] investigate the present influence of consignment, commission and company-operated stations in price leadership, maintenance or fixing, or in price discrimination against independent lessee-dealers, as possible violations of the antitrust laws." (Pl. Ex. 80, p. 17)

Thus by August 1957 Union Oil Company was well aware that its consignment agreement program was the subject of Congressional inquiry and of a demand for Department of Justice investigation. The testimony of Union Oil Company's General Sales Manager, Mr. Rath, before Subcommittee No. 5 was part of the Simpson record.(R. 115-178) This testimony shows that Mr. Rath withheld from the Subcommittee the full purpose of the Union Oil Company consignment dealer program and the means used, i.e., that it was a mandatory program. Mr. Rath gave confusing testimony to the effect that the dealer was free to go on purchase and sale if he desired. (R. 147-150) This explanation of Union Oil's consignment program, is of course, contrary to what happened to Mr.

Simpson and shows, it is respectfully urged, that Union Oil believed the wisest course to follow was to withhold the mandatory nature of the program from an investigating body of the United States Congress. This is clearly relevant in showing that Union Oil Company believed that the state of the law was such that testimony should indicate a non-mandatory program.

Immediately following the House of Representatives Sub-committee No. 5 Report, the Federal Trade Commission filed cases against consignment agreement programs. These cases, FTC v. Sun Oil Company and FTC v. Atlantic Refining Company, were referred to by this Honorable Court in Simpson v. Union Oil Company of California, 311 F.2d 764, 769 (9th Cir. 1963). This series of events required the court to find that Union Oil could not reasonably have believed that the consignment agreement program as carried out was wholly lawful and did not violate the antitrust laws of the United States. Even if admonitory judicial precedent be ignored, to find Union's protestations of innocence "fully justified" flies in the very face of the Congressional recommendation that the Department of Justice investigate consignment agreement programs.

13. Finding of Fact Number 13

Finding of Fact Number 13 is in conflict with the Supreme Court decision in Simpson. It is respectfully submitted that the Supreme Court itself determined the state of the law as to price fixing by suppliers or their dealers. The Supreme Court decision in Simpson did not reverse or overrule General Electric; the Supreme Court stated, rather, that it would not

price fixing on non-patented articles.

The Simpson decision followed the line of cases rendering retail price maintenance agreements unlawful per se and preventing manufacturers from taking coercive steps to enforce their policies on those who would otherwise follow their independent judgment. These principles were well known to the business world. The holding of Simpson v. Union Oil Co. in the Supreme Court did not constitute a new rule that "vast" price-fixing consignment agreements, not limited to those coercively employed, can no longer be considered agancies under the antitrust laws, 377 U.S. at 21-22, was thought by the dissenter to represent a new departure and hence to inject severe uncertainty into commercial relations. This in turn could be answered by the doctrine of prospectivity. The majority may be presumed, in its last sentence, to have replied to Justice Stewart's predictions that noncoercive bona fide consignment systems fixing resale prices would come before the Court. Id., 25. The Court, however, necessarily distinguished any rule which would result from the Simpson decision in the future from the preexisting rules which governed the result in that case, in their considered rejection of the arguments of Justice Stewart and of appellee, who has ignored the Court's judicial finding of coercion in the institution and operation of Union's consignment program.

14. Finding of Fact Number 14

finding of fact number 14 is beyond the powers of the Court and beyond the proper function of a court of equity. Union Oil Company determined to enforce its consignment agreement program despite investigations by the House of Representatives, the Department of Justice and this single Union Oil dealer who was unceremoniously turned out of his business. It evinced a fixed determination to maintain control over retail prices against all sources of antitrust enforcement. General Counsel of appellee did not examine the issue of coercion involved in its program.

The antitrust laws have always stood for the independence of the dealer to determine matters of price and products, free of the coercive requirements of suppliers. Union Oil cannot on the one hand create independent businessmen in its leasing arrangements and on the other control their judgments as to the most important aspect of their business, the retail price charged. Appellee carried out a price control program by which the dealer's retail prices were coerced by harassment and threats, as occurred against Simpson, and now expresses surprise that its conduct should be declared actionable. Equity cannot lend its hand to legalize a coercive actor's unlawful scheme and grant it immunity against the legal remedies of a person injured in his business and property.

Even if it were within the province of a court of equity to grant immunity in the Simpson case, a record showing coercive programs knowingly and actively conducted by Union Oil Company against the dealer's independent judgment would preclude relief. A history of investigation by the House of

with respect to appellee's price fixing activities gainsays guiltless ignorance. One who with such warnings enters into a program tying price fixing agreements to leases, policing those prices, and threatening the dealers with loss of their business cannot obtain relief from a court of equity. Fairness and the policy of the antitrust laws prevent such a result. The parties should be left to their legal relationship.

III. A VERDICT WITHIN THE RANGE OF ARGUMENT PERMITTED BY THE COURT AND SUPPORTED BY EVIDENCE PROPERLY ADMITTED IS A PROPER BASIS FOR JUDGMENT.

A. The Court Should Have Struck the Statements of Jurors Grigon, Smith and Price Impeaching the Verdict Before It Considered Defendant's Motion for a New Trial.

The appellee requested jurors to sign affidavits as to what occurred in the jury room concerning the jury's deliberations in reaching a verdict. Appellee then filed two affidavits and a declaration following its investigation. (Cr. 361-362) Ethical questions aside, this method of attacking a verdict is contrary to proper administration of justice and the trial court exceeded its discretion in not striking the solicited statements.

Consideration of the jury affidavits and declarations here is in conflict with the opinion in Northern Pacific Railway Company v. Mely, 219 F.2d 199 (9th Cir. 1954). In this

case the Ninth Circuit advised the Bar that it would be improper or unethical for attorneys to investigate jurors and file affidavits going into the manner in which the jurors arrived at their deliberations. This court specifically stated:

> " . . . We do hold for future guidance that it is improper and unethical for lawyers, court attaches or judges in a particular case to make public the transactions in the jury room or to interview jurors to discover what was the course of deliberation of a trial jury." 219 F.2d at 202.

Notwithstanding this guidance from the Ninth Circuit, the defendants filed affidavits and a declaration as to what occurred in the jury room and the court refused to strike them. (Cr. 361-362) These affidavits and declaration should not have been countenanced by the court, and it was prejudicial error to do so. See McDonald v. Pless, 238 U.S. 264 (1915); Smith-Blair, Inc. v. R.H. Baker & Co., 232 F. Supp. 484 (S.D. Cal. 1962), aff'd, 331 F.2d 506 (9th Cir. 1964); Fort Worth & Denver Ry. Co. v. Thompson, 216 F.2d 790, 793 (5th Cir. 1954); cf. Stein v. New York, 346 U.S. 156, 178-179 (1953)(distinguishing interrogatories from post-trial questioning); Galarza v. Union Bus Lines, Inc., 38 F.R.D. 401 (S.D. Tex. 1965). It is clearly the rule that a verdict will not be impeached by affidavits or declarations claimed to show the instructions were not followed, see E.L. Farmer & Co. v. Hooks, 239 F.2d 547, 553-555 (10th Cir. 1956), yet

this is basically what the defendants sought (See Tr. 1663) The Court should not have ruled with the affidavits before it.

B. The Trial Court Erred in Granting Defendant's Motion to Set Aside the Verdict and Granting a New Trial.

The defendant intended to destroy Simpson's business and did so. It was for the jury to determine a fair measure of the value of that business. Accordingly, it was presented with a valuation study prepared by Morton Paglin, Ph.D., Professor of Economics at Portland State College, Oregon, and teacher of economics, public finance, economic development and statistics. (Tr. 748-749) Dr. Paglin first valued Simpson's business in terms of Mr. Simpson's expected business life, estimated at 24 years, and based upon projections from Simpson's business records he determined the estimated net income which Simpson's business could have produced in these 24 years. It was the policy of appellee continually to renew leases. (Tr. 274-278)

Dr. Paglin first applied Mr. Simpson's actual 1956 gallonage to projected gasoline gallonage of 17,452 gallons, which was the three-month average of the service stations for June, July and August, 1957. This period was chosen because a first year of business is not represenative and because highway construction commenced in the vicinity of Simpson's station in November 1957. (Tr. 756-757, 763) Based upon the actual income and the actual average gallonage, Dr. Paglin valued Mr. Simpson's business at $97,398.

Secondly, Dr. Paglin projected the actual profits made by Mr. Simpson in this three-month period of $809.00 over the

24-year period. This projection resulted in a valuation of $147,895.00. (See Tr. 765) When Dr. Paglin made his original projections, he did not have the Union Oil Company's estimated gallonage of the service station involved. These records were subpoened at the trial, and that was the first time that plaintiff had access to the information. Defendant's records estimated the potential of the station to be 25,000 gallons per month. (Pl. Exs. 71 & 72) Based upon Union's estimate of gallonage of 25,000 gallons a month at the station, Dr. Paglin estimated that Simpson's income would be $13,200 income a year. (Tr. 769) Using the standard annuity tables, $13,200 income for a 24-year had a capitalized value of $211,970.80 at 3% interest and $201,260.40 at 4% interest.

The jury verdict is thus well within the range of lost values to Mr. Simpson for the destruction of his business intended by the defendant. The defendant destroyed Mr. Simpson's business, the potential of Mr. Simpson's business, and the fruit of his two years of efforts as the service station. 24 years of a man's business career has been trifled with by defendant, and a person has been subjected to coercion and threats contradictory to the meaning and purposes of the Sherman Act. The profit potential of the business which would have been available to Mr. Simpson but for defendant's violation of the antitrust laws has been properly valued by the jury and its decision should not be interfered with.

It is respectfully urged that the court's granting a new trial amounts to error, for the exercise of a trial court's

discretion on motion for new trial is not free of legal guidance. As this Court pointed out in Liquid Veneer Corp. v. Smuckler, 90 F.2d 196, 205 (9th Cir. 1937), "[t]he damages awarded is a matter for the jury [,] which is given wide discretion ... a verdict for plaintiff should not be set aside if it can be sustained from any viewpoint of approach." The use of the jury system in the federal courts requires that "reasonably disputable issues of fact . . . be resolved by the jury." Peterman v. Indian Motorcycle Co., 216 F.2d 289, 292 (1st Cir. 1954). Once a case is properly submitted to that body, the losing party does not have a right to a second try, "even though the evidence submitted would have warranted the opposite verdict, and even though the trial judge, had he been sitting without a jury, might have found the facts the other way." Id., 292-293. This is as applicable to the size of the verdict as to the direction in which it is cast. "Whether a judgment is high or low, it should stand if there is ample evidence to justify it. It is not the prerogative of the Court to arbitrarily substitute its judgment for that of the jury." Mainelli v. Haberstroh, 237 F. Supp. 190 (M.D. Pa. 1964). Thus the mere invocation of such words as "monstrous" does not justify the District Court's ruling where the amount of the verdict is sustained by the evidence.

Not only is the verdict within the evidence given to the jury and based upon the court's instructions, but the conduct of the jury was, according to all cognizable portions of the record, entirely proper. The judgment, however, states that "the verdict . . . is the result . . . of consideration

(Cr. 550) This cannot be supported. The court by its own satesment (Tr. 1803)(semble) did not give effect to the affidavits of jurors Price and Smith and the declaration of juror Grignon obtained ex parte by the movant below. This is thus no cognizable evidence of the jury's consideration of irrelevant factors. Yet the record at Cr. 550, supra, indicates that the court was unconsciously influenced by appellee's moving papers, which in turn reflected the fruits of unethical jury interviews. Thus appellee has caused error by placing improper affidavits before the court when it was to rule on Union's motion for a new trial. Appellee thereby succeeded in obtaining a result which it could not have hoped for had its counsel confined themselves to professional conduct.

It is respectfully urged therefore that the court enter a mandate which allows the entry of judgment based on the jury verdict.

CONCLUSION

Plaintiff has established that defendant has violated the Sherman Act to his damage in the sum of $160,000.00. The Supreme Court opinion does not sanction the result below.

Wherefore, appellant prays that this Court reverse the judgment below and direct that judgment be entered on the jury verdict.

DATED: _____

Respectfully submitted,

MAXWELL KEITH
R. CORBIN HOUCHINS

JAMES J. DURYEA
Attorneys for Appellant

by: _____
MAXWELL KEITH

his brief, I have examined Rules 18, 19 and 39 of the United
tates Court of Appeals for the Ninth Circuit, and that, in
y opinion, the foregoing brief is in full compliance with
hose rules.

MAXWELL KEITH

AFFIDAVIT OF MAILING

STATE OF CALIFORNIA]
: ss.
CITY AND COUNTY OF SAN FRANCISCO]

VICTOR JACOBS, being duly sworn, deposes and says:

That he has caused to be served a copy of Appellant's Opening Brief in the above-entitled action by mailing a copy of the Appellant's Opening Brief to the following named attorneys for the Appellee in the said case at the address hereinafter set forth, postage paid, this 29th day of March, 1968.

Mr. Moses Lasky
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California

Attorney for Appellee

_____
VICTOR JACOBS

Subscribed and sworn to before me
this ____ day of March, 1968.

_____
Notary Public
In and for the City and County of
San Francisco, State of California

My Commission expires: _____

Plaintiff's Exhibits

Exhibit Number	Identified	Offered	Received	Rejected
1	258	258	258	
2	308	308	308	
3	316	316	316	
4	323	324	324	
5	342	342	342	
6	342	342	342	
7	369	370	370	
8	382	382	382	
9	386	386	387	
11	411	411	411	
12	413	416	417	
13	417	417	417	
14	417	417	417	
15	418	418	418	
16	420	420	420	
17	424	424	425	
18	427	427	427	
19	427	427	427	
20	428	428	428	
21	428	428	428	
22	429	429	429	
23	430	430	430	
24	431	431	431	
25	431	431	431	

Exhibit Number	Identified	Offered	Received	Rejected
26	431	432	432	
27	432	432	432	
28	432	432	433	
29	434	434	434	
30	440	440	440	
31	440	440	440	
32	442	442	442	
33	444	444	444	
34	445	445	445	
35	445	445	445	
36	445	445	445	
37	446	446	446	
38	446	446	446	
39	447	447	447	
40	447	447	447	
41	447	447	447	
42	455	455	455	
43	455	455	455	
44	456	456	456	
45	456	456	456	
46	457	457	457	
47	457	457	457	
48	457	457	457	
49	481	481	481	
50	488	488	488	
51	496	496	496	

Exhibit Number	Identified	Offered	Received	Rejected
52	503	503	503	
53	580	580	580	
53-A	667	667	667	
53-B	667	667	667	
54	580	580	580	
55	619	619	619	
56	620	620	620	
57	625	625	625	
58	627	627	627	
59	629	629	629	
60	663	663	663	
61	667	667	667	
62	669	669	669	
63	675	675	675	
64	676	676	676	
65	677	677	677	
66-A	680	680	680	
66-B	680	680	680	
67	700	700	700	
68	770	770	770	
69	884	884	884	
70	906	905, 919		919
71	912	912	**	
72			**	
73	1216	1216	1216	
74	912	1255	1261	

Exhibit Number	Identified	Offered	Received	Rejected
75	1279			
76	1330	1335		1335
77	1331	1335		1335
78	1331	1335		1335
79	1346	1347		
80	1349	1365	1365	
81	*		***	
82			***	
83			***	
84			***	
85	*			
86	*			
87	*			
88	*			
89	*			
90	*			
91	*			
92	*			
93			***	

* Marked by clerk for identification only.

** Received into evidence on February 6, 1967.

*** Received into evidence on February 14, 1967.

Exhibit Number	Identified	Offered	Received	Rejected
A	514	515	515	
B	515	517	518	
C	519	782	783	
D		782	783	
E	787	787	788	
F	788	792	792	
G	831	832	833	
H	855	856	859	
I	866	868	870	
J	947	949	949	
K	961	969	970	
L	961	969	970	
M	970	971	972	
N	972	972	974	
O	1138	1138	1138	
P	1216	1216	1216	
R	1388	1388	1388	
S	1396	1396	1396	
T	1492	1492	1493	